IMMIGRATION LAW

IN THE NINTH CIRCUIT

Selected Topics

January 2009 Supplement

The Immigration Outline and this Supplement are not intended to express the views or opinions of the Ninth Circuit, and may not be cited to or by the courts of this circuit.

Recently published decisions and updates to previously cited decisions are cited within this supplement, which should be used in conjunction with the June 2008 Immigration Outline.

These materials are provided as a resource to assist attorneys in analyzing petitions for review. The outline synthesizes procedural and substantive principles relating to immigration law in the Ninth Circuit and covers the following topics: Jurisdiction, Standards of Review, Relief from Removal (e.g. Asylum, Cancellation of Removal, Adjustment of Status), Motions to Reopen or Reconsider, Criminal Issues, Due Process, and Attorney Fees. These research tools are only a starting point. You are encouraged to conduct independent research and verify that cited decisions are still good law.

Corrections and comments may be e-mailed to Jennifer Rich at jennifer_rich@ca9.uscourts.gov.

JURISDICTION OVER IMMIGRATION PETITIONS AND STANDARDS OF REVIEW

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The failure of the notice to appear to fully specify the statutory provisions alleged to be violated by failing to include any aggravated felony subsections does not deprive the immigration court of jurisdiction. *See* *Lazaro v. Mukasey*, 527 F.3d 977, 979-80 (9th Cir. 2008) (holding that the failure of the notice to appear to designate which subsection of the statute defining aggravated felony was applicable did not deprive immigration court of jurisdiction).

B. Petition for Review Exclusive Means for Judicial Review over Final Orders of Deportation and Removal. A-4

See also *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133 (9th Cir. 2008) (jurisdictional limitations on review of reinstated expedited removal order do not violate the Suspension Clause).

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Kalilu v. Mukasey, 516 F.3d 777, 779 n.1 (9th Cir.) (per curiam), *amended and superseded on denial of rehearing by* 548 F.3d 1215, 1217 n.1 (9th Cir. 2008) (per curiam) (stating the court lacked jurisdiction to review claim that BIA erred in denying his request for voluntary departure).

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Kalilu v. Mukasey, 516 F.3d 777, 779 n.1 (9th Cir.) (per curiam), *amended and superseded on denial of rehearing by* 548 F.3d 1215, 1217 n.1 (9th Cir. 2008) (per curiam) (stating the court lacked jurisdiction to review claim concerning denial of merits of asylum application because petitioner failed to challenge it before the BIA).

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Granados-Oseguera v. Gonzales, 464 F.3d 993 (9th Cir. 2006), *withdrawn and superceded by* 546 F.3d 1011 (9th Cir. 2008) (per curiam). The most recent decision in *Granados-Oseguera* no longer discusses jurisdiction to review an IAC claim not raised before the BIA.

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Afridi v. Gonzales, 442 F.3d 1212, 1218 (9th Cir. 2006) (holding with respect to particularly serious crimes that "[w]hile we cannot reweigh evidence to determine if the crime was indeed particularly serious, we can determine whether the BIA applied the correct legal standard in making its determination"), *overruled on other grounds by* *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008).

See also *Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008) (mandate pending) (considering question of law whether the applicable statutes permit the agency to determine petitioner's offenses to be "particularly serious" by individual adjudication).

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The mandate has issued in *Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (holding that aliens whose petitions for review were rendered untimely by enactment of REAL ID Act had a grace period of 30 days from the Act's effective date in which to seek review).

VI. EXCLUSIVE JURISDICTION PROVISION – 8 U.S.C. § 1252(g). . . . A-41

Shin v. Mukasey, 519 F.3d 901, 905 (9th Cir.), *withdrawn and superceded by* 547 F.3d 1019, 1023 (9th Cir. 2008) (mandate pending) (no jurisdiction to review Attorney General's decision to commence proceedings).

See also *Shin*, 547 F.3d at 1023-24 (§ 1252(g) did not bar jurisdiction over petitioner's equitable estoppel claim that arose from actions taken by a government employee prior to any decision to commence proceedings against petitioner).

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"[R]eview of the reinstatement itself is limited to confirming the agency's compliance with the reinstatement regulations." *Garcia de Rincon v. Mukasey*, 539 F.3d 1133, 1137 (9th Cir. 2008) (concluding that court lacked jurisdiction to review reinstated *expedited* removal order, where alien's challenge to the reinstated removal order was not a habeas petition and did not contest the expedited removal order on any of the enumerated permissible grounds in 8 U.S.C. § 1252(e)).

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I. Motions for Continuance *(new section)*

The court retains jurisdiction to review an IJ's discretionary denial of a continuance. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246-47 (9th Cir. 2008). Under 8 C.F.R. § 1003.29, an IJ may grant a continuance for good cause shown. "When evaluating an IJ's denial of a motion for continuance [the court] consider[s] a number of factors – including, for example, (1) the importance of the evidence, (2) the unreasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted." *Cui v. Mukasey*, 538 F.3d 1289, 1292 (9th Cir. 2008). The question of whether the denial of a continuance constitutes an abuse of discretion must be resolved on a case-by-case basis. *See id.* (concluding IJ abused his discretion by denying petitioner's motion for a continuance so petitioner could resubmit her fingerprints).

J. Administrative Closure *(new section)*

The court lacks jurisdiction to review the BIA's denial of an alien's request for administrative closure. *See* *Diaz-Covarrubias v. Mukasey*, No. 06-70447, — F.3d —, 2009 WL 50117, *2-*3 (9th Cir. January 9, 2009) (mandate pending) (concluding that court lacked jurisdiction to review for abuse of discretion an alien's request to administratively close her immigration case where there was no statutory or regulatory basis for administrative closure and there was no meaningful standard applicable to the BIA's exercise of its discretion to implement closure).

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See also *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) ("If the BIA issues a written opinion, it is that opinion which is under review.").

2. Where BIA Conducts Abuse of Discretion Review. A-49

3. Where BIA Incorporates IJ's Decision. A-50

See also *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744-46 (9th Cir. 2008) (mandate pending) (review confined to BIA decision except to extent BIA incorporated IJ's decision); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (reviewing IJ decision where BIA decision drew examples from it); *Ahir v. Mukasey*, 527 F.3d 912, 916 (9th Cir. 2008) (reviewing both the IJ and BIA decision to the extent the BIA incorporated the IJ decision as its own).

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Orozco v. Mukasey, 521 F.3d 1068, 1070 (9th Cir.) (explaining that where BIA expressed no disagreement with IJ's decision the court reviews the IJ's decision as if it were a decision of the BIA), *vacated by* 546 F.3d 1147 (9th Cir. 2008) (order).

See also *Zhao v. Mukasey*, 540 F.3d 1027, 1029 (9th Cir. 2008) (where the BIA affirms the IJ decision citing *Burbano* and expresses no disagreement with it, the court reviews the IJ's decision as if it were that of the BIA).

5. Where BIA's Standard of Review is Unclear. A-50

Cf. *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (reviewing IJ decision where there was an ambiguity in the BIA's decision, which drew illustrative examples from the IJ's decision).

6. Single Board Member Review. A-51

See also *Choin v. Mukasey*, 537 F.3d 1116, 1120 (9th Cir. 2008) ("When BIA advances its interpretation of an ambiguous statute in an unpublished decision" it is not entitled to *Chevron* deference; rather, *Skidmore* deference applies.").

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See also *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047, 1052 (9th Cir. 2008) (explaining the court "has jurisdiction to determine whether the BIA complied with its own regulations in deciding to streamline").

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See also *Doissaint v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008) (stating the court cannot affirm on a ground upon which the BIA did not rely).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

See also *Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008) (because petitioner failed to advance argument in support of CAT claim, the issue was waived).

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The BIA cannot cure the legal error of ignoring a claim in a petitioner's direct appeal by subsequently considering the claim in a motion to reopen. *See* *Doissaint v. Mukasey*, 538 F.3d 1167, 1170-71 (9th Cir. 2008) (concluding the BIA erred by determining that alien's properly raised and briefed CAT claim was abandoned on appeal, and that BIA failed to cure the error by subsequently considering the claim in a motion to reopen).

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See also *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1208 (9th Cir. 2008) (whether petitioner assisted in alien smuggling).

2. Substantial Evidence Review. A-59

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

See, e.g., *Zhao v. Mukasey*, 540 F.3d 1027, 1030 (9th Cir. 2008) (concluding substantial evidence did not support IJ's rejection of the aliens' claim of well-founded fear of persecution); *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1208

(9th Cir. 2008) (reviewing factual finding relating to alien smuggling for substantial evidence).

3. Abuse of Discretion Review. A-60

The denial of a motion for a continuance is reviewed for abuse of discretion. *See* *Cui v. Mukasey*, 538 F.3d 1289, 1290 (9th Cir. 2008) (holding that IJ abused discretion by denying a motion for a continuance so the petitioner could resubmit her fingerprints to the court).

a. Failure to Provide Reasoned Explanation A-60

b. Failure to Consider Arguments or Evidence. A-61

When the BIA commits legal error by ignoring a claim in a petitioner's direct appeal, it cannot cure that error by subsequently considering the claim in a motion to reopen. *See* *Doissaint v. Mukasey*, 538 F.3d 1167, 1170-71 (9th Cir. 2008) (concluding the BIA erred by determining that alien's properly raised and briefed CAT claim was abandoned on appeal, and that error was not cured by subsequent consideration of the claim in a motion to reopen).

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See also *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1015 n.5 (9th Cir. 2008) (mandate pending) (noting that in removal proceedings it is the burden of the government to show identity and alienage).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

1. Presumption of a Well-Founded Fear. B-17

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

"When the petitioner establishes past persecution, the government bears the burden of establishing that changed country conditions have removed the petitioner's presumptive well-founded fear of future persecution" *Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) (concluding government failed to meet burden where it submitted a single newspaper article that in no way suggested Chaldean Christians would be safe in Iraq).

(i) State Department Report. B-19

The mandate has issued in *Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) (rejecting petitioner's contention that "generalized materials" found in State Department country report did not support conclusion that fear of persecution in Sierra Leone had been rebutted).

(ii) Administrative Notice of Changed Country Conditions. B-19

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

d. Internal Relocation. B-21

3. Humanitarian Asylum. B-22

See also *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (remanding for BIA to consider whether alien was eligible for asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A)).

a. Severe Past Persecution. B-23

(i) Compelling Cases of Past Persecution for Humanitarian Asylum. B-23

The mandate has issued in *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (remanding for consideration of humanitarian relief where "BIA erred in failing to determine whether, assuming the truth of Sowe's testimony that he witnessed his parents' murder, the severing of his brother's hand, and his sister's kidnaping, he provided compelling reasons for his being unwilling or unable to return to Sierra Leone.").

(ii) Insufficiently Severe Past Persecution for Humanitarian Asylum. B-24

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The mandate has issued in *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (petitioner failed to show "other serious harm" aside from claimed fear of persecution, which had been rebutted; but remanding for BIA to consider whether alien was eligible for asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A)).

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1. Past Persecution Not Required. B-26

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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d. Membership in Disfavored Group B-31

5. Countrywide Persecution. B-32

6. Continued Presence of Applicant. B-33

7. Continued Presence of Family. B-34

See also *Zhao v. Mukasey*, 540 F.3d 1027, 1031 (9th Cir. 2008) (explaining that the well-being of others who have stayed behind in a country is only relevant when those others are similarly situated to the petitioners).

8. Possession of Passport or Travel Documents. B-35

See also *Zhao v. Mukasey*, 540 F.3d 1027, 1031 (9th Cir. 2008) (petitioners' ability to acquire a passport and travel to Beijing for a visa interview despite travel restriction did not undermine claim of a well-founded fear of persecution).

9. Safe Return to Country of Persecution. B-35

See also *Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (noting that an "alien's history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution").

10. Cases Finding No Well-Founded Fear. B-36

F. Nexus to the Five Statutorily Protected Grounds. B-36

Replace quotation to *Parussimova* *with the following:*

> [A] motive is a "central reason" if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a "central reason" if that motive, standing alone, would have led the persecutor to harm the applicant. . . . [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground

was "at least one central reason" for persecution, an applicant must prove that such ground was a cause of the persecutors' acts.

Parussimova v. Mukasey, No. 06-75217, — F.3d —, 2009 WL 161220 , *5 (9th Cir. January 26, 2009) (mandate pending).

1. Proving a Nexus. B-37

a. Direct Evidence. B-37

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

b. Circumstantial Evidence. B-38

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

2. Mixed-Motive Cases. B-39

The mandate has issued in *Zhu v. Mukasey*, 537 F.3d 1034, 1044-45 (9th Cir. 2008) (applicant who was raped by her factory manager was repeatedly sought by police at least in part on account of political opinion imputed to her as the result of her whistle-blowing).

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220, *5 (9th Cir. January 26, 2009) (mandate pending) ("[A] motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a 'central reason' if that motive, standing alone, would have led the persecutor to harm the applicant. . . . [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was 'at least one central reason' for persecution, an applicant must prove that such ground was a cause of the persecutors' acts.").

3. Shared Identity Between Victim and Persecutor. B-41

4. Civil Unrest and Motive. B-41

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

5. Resistance to Discriminatory Government Action. B-42

6. The Protected Grounds. B-42

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

(ii) Cases Finding No Racial or Ethnic Persecution B-43

b. Religion. B-43

(i) Cases Finding Religious Persecution. B-44

The mandate has issued in *Zhao v. Mukasey*, 540 F.3d 1027, 1029-31 (9th Cir. 2008) (petitioners demonstrated a well-founded fear of future persecution on account of their Falun Gong practice).

(ii) Cases Finding No Religious Persecution. B-45

c. Nationality. B-46

d. Membership in a Particular Social Group. B-46

To determine whether a social group exists, the court considers certain factors, including "whether a group's shared characteristic gives members social visibility and whether the group can be defined with sufficient particularity to delimit its membership." *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007); *see also* *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744 (9th Cir. 2008) (mandate pending).

(i) Types of Social Groups. B-47

(A) Family and Clan. B-47

"Where the claimed group membership is the family, a family member's continuing safety [in the petitioner's hometown] is a . . . persuasive factor in considering a petitioner's well-founded fear." *Santos-Lemus v. Mukasey*, 542 F.3d 738, 743 (9th Cir. 2008) (mandate pending).

(B) Gender-Related Claims. B-47

(1) Gender Defined Social Group. . . B-47

(2) Gender Specific Harm. B-48

(C) Sexual Orientation. B-49

(D) Former Status or Occupation. B-50

(ii) Cases Denying Social Group Claims. B-50

The mandate has issued in *Toufighi v. Mukasey*, 538 F.3d 988 (9th Cir. 2008) (explaining the court has never "recognized pro-Western as a social group protected against persecution").

See also *Donchev v. Mukasey*, No. 05-74709, — F.3d —, 2009 WL 103661 (9th Cir. January 16, 2009) (mandate pending) (rejecting Bulgarian alien's claim that he was in a "particular social group" as a friend of the Roma people); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744-46 (9th Cir. 2008) (mandate pending) (alien's proposed social group of young Salvadoran men who resist gang violence lacks both particularity and social visibility and thus, is not a social group).

e. Political Opinion. B-50

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

But see Santos-Lemus v. Mukasey, 542 F.3d 738, 746-47 (9th Cir. 2008) (mandate pending) (alien's general aversion to gangs did not constitute a political opinion for asylum purposes).

(iii) Labor Union Membership and Activities. B-52

(iv) Opposition to Government Corruption. B-52

The mandate has issued in *Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008) (applicant who was raped by her factory manager was repeatedly sought by police after writing a "letter to the town government [that] was more than a report of the rape: She condemned the appointment and protection - on the basis of family political connections - of people like the manager who raped her").

(v) Neutrality. B-53

(vi) Other Expressions of Political Opinion. B-54

(vii) Imputed Political Opinion. B-54

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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(D) Other Cases Discussing Imputed Political Opinion. B-57

The mandate has issued in *Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008) (applicant who was raped by her factory manager and later wrote a letter to the town government complaining of corruption "established that the police repeatedly sought to arrest her on the basis of a political opinion imputed to her as the result of her whistle-blowing").

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

(viii) Opposition to Coercive Population Control Policies. B-58

(A) Forced Abortion. B-59

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

(ii) Illegal Departure Laws. B-64

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

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G. Exercise of Discretion. B-69

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The mandate has issued in the following cases: *Al-Mousa v. Mukasey*, 518 F.3d 738, 740 (9th Cir. 2008), *withdrawn*, 545 F.3d 694 (9th Cir. 2008); *Tekle v. Mukasey*, 533 F.3d 1044, 1056 (9th Cir. 2008).

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

See also *Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008) (remanding for BIA to consider whether petitioner fulfilled burden of establishing well-founded fear of persecution); *cf.* *Latu v. Mukasey*, 547 F.3d 1070, 1075-76 (9th Cir. 2008) (granting petition and declining government's request to remand under *Ventura* so BIA could consider modified categorical approach, where BIA already considered whether offense was a crime involving moral turpitude and all evidence had been presented to BIA).

I. Derivative Asylees. B-73

J. Bars to Asylum. B-74

1. One-Year Bar. B-74

a. Exceptions to the Deadline. B-75

The mandate has issued in the following cases: *Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (holding that BIA properly concluded alien lost nonimmigrant status when he failed to enroll in a semester of college classes in January 2003, and that alien then failed to file application within a "reasonable period" when he waited 22 months without further explanation for delay); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008) (holding that 364-day delay

after alien's nonimmigrant status expired was not a "reasonable period" in the absence of any explanation).

2. Previous Denial Bar. B-76

3. Safe Third Country Bar.. . . . . B-76

4. Firm Resettlement Bar. B-76

5. Persecution of Others Bar. B-79

6. Particularly Serious Crime Bar B-80

The "'Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime . . . .'" *See* Delgado v. Mukasey, 546 F.3d 1017, 1022 (9th Cir. 2008) (mandate pending) (quoting 8 U.S.C. § 1158(b)(2)(B)(ii)) (alteration in original). The Attorney General may also determine by adjudication that a crime is particularly serious without first classifying it by regulation. *See* *Delgado*, 546 F.3d at 1022-23.

The court lacks jurisdiction to review the merits of the BIA's determination that a conviction is a particularly serious crime. *See* *id.* at 1023-25.

7. Serious Non-Political Crime Bar. B-81

8. Security Bar. B-81

9. Terrorist Bar. B-81

III. WITHHOLDING OF REMOVAL OR DEPORTATION. B-82

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

A. Eligibility for Withholding. B-83

1. Higher Burden of Proof. B-83

See also *Sowe v. Mukasey*, 538 F.3d 1281, 1288 (9th Cir. 2008) ("When the government rebuts an applicant's well-founded fear of future persecution, it defeats the applicant's asylum claim, and his or her claim for withholding of removal.").

2. Mandatory Relief. B-83

3. Nature of Relief.. . . . . B-84

4. Past Persecution. B-84

See also *Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) ("[A] petitioner can generate a presumption of eligibility for withholding of removal by showing past persecution.").

5. No Time Limit. B-84

6. Firm Resettlement Not a Bar. B-84

7. Entitled to Withholding.. . . . . B-85

Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

See also *Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) (reversing denial of claim for withholding of removal where government failed to provide reliable evidence of a fundamental change in circumstances in Iraq and nothing in record showed petitioner could relocate, and remanding).

8. Not Entitled to Withholding. B-87

See also *Sowe v. Mukasey*, 538 F.3d 1281, 1288 (9th Cir. 2008) (not entitled to withholding of removal where government rebutted alien's well-founded fear of future persecution by showing changed country conditions in Sierra Leone).

9. No Derivative Withholding of Removal. B-87

B. Bars to Withholding. B-88

1. Nazis. B-88

2. Persecution-of-Others Bar. B-88

3. Particularly Serious Crime Bar. B-88

The Attorney General may determine by adjudication that a crime is particularly serious even though it is not classified as an aggravated felony. *See* *Delgado v. Mukasey*, 546 F.3d 1017, 1019-22 (9th Cir. 2008) (mandate pending) (concluding BIA was entitled to determine by adjudication that petitioner's DUI convictions were particularly serious crimes barring him from eligibility for withholding of removal).

The court lacks jurisdiction to review the merits of the BIA's determination that a conviction is a particularly serious crime. *See id.* at 1023-25.

4. Serious Non-Political Crime Bar. B-89

5. Security and Terrorist Bar.. . . . . B-89

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B. Definition of Torture. B-91

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M. Habeas Jurisdiction. B-98

N. Cases Granting CAT Protection. B-98

O. Cases Finding No Eligibility for CAT Protection. B-98

The mandate as has issued in *Dhital v. Mukasey*, 532 F.3d 1044, 1050-52 (9th Cir. 2008) (state department reports failed to demonstrate applicant faced "any particular threat of torture beyond that of which all citizens of Nepal are at risk").

See also *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744-46 (9th Cir. 2008) (mandate pending) (evidence of changed country conditions in Sierra Leone defeated CAT claim).

V. CREDIBILITY DETERMINATIONS. B-100

A. Standard of Review. B-100

See also *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) ("This court reviews factual determinations, including credibility determinations, for substantial evidence.").

B. Opportunity to Explain. B-101

See also *Tekle v. Mukasey*, 533 F.3d 1044, 1052-55 (9th Cir. 2008) (rejecting adverse credibility finding where alien was not provided an opportunity to explain certain inconsistencies, and where the IJ failed to address explanations alien gave for other inconsistencies).

C. Credibility Factors. B-102

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2. Responsiveness. B-102

3. Specificity and Detail. B-103

4. Inconsistencies. B-103

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b. Substantial Inconsistencies. B-104

See also *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008) (concluding that omission of political activism went to the heart of the claims and was not a "mere detail").

Note that for all *applications* for asylum, withholding, or other relief from removal *made on or after May 11, 2005*, sections 101(a)(3), (c) and (d)(2) of the REAL ID Act created the following new standards governing the trier of fact's adverse credibility determination. Under the new standard, an adverse credibility determination can be based on inconsistencies "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. §§ 1158(b)(1)(B)(iii) (asylum); 1231(b)(3)(C) (withholding of removal); 1229a(c)(4)(C) (other relief from removal).

Cross-reference: The REAL-ID Act Codification of Credibility Standards

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16. Failure to Seek Asylum Elsewhere. B-113

The mandate has issued in *Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (distinguishing *Ding*, and concluding that alien's admission that she voluntarily returned to Indonesia twice following previous trips to the United States "inherently undermines her testimony that she experienced past suffering or that she feared returning home").

17. Cumulative Effect of Adverse Credibility Grounds. B-114

18. Voluntary Return to Country *(new section)*

An adverse credibility finding can be based in part on the alien's voluntary return to his or her home country. *See* *Loho v. Mukasey*, 531 F.3d 1016, 1018 (9th Cir. 2008) (holding that adverse credibility finding based in part on alien's admission that she willingly returned to her home country was supported by substantial evidence where alien's voluntary return to Indonesia following trips to the United States undermined testimony that she suffered past persecution and feared returning).

D. Presumption of Credibility. B-114

E. Implied Credibility Findings. B-114

1. Immigration Judges.. . . . . B-114

The mandate has issued in *Toufighi v. Mukasey*, 538 F.3d 988, 995 (9th Cir. 2008) (concluding that through the IJ's qualifying remarks, the IJ made an express adverse credibility determination as to petitioner's claim that he converted to Christianity).

2. Board of Immigration Appeals. B-115

F. Sua Sponte Credibility Determinations and Notice.. . . . . B-115

G. Discretionary Decisions. B-116

H. Frivolous Applications. B-116

Kalilu v. Mukasey, 516 F.3d 777, 779 (9th Cir. 2008) (per curiam), *amended and superseded on denial of rehearing by* 548 F.3d 1215, 1217 (9th Cir. 2008) (per curiam) ("A determination that an applicant filed a frivolous asylum application renders the applicant permanently ineligible for immigration relief.").

I. Remedy. B-117

J. Applicability of Asylum Credibility Finding to the Denial of other Forms of Relief. B-118

K. Cases Reversing Negative Credibility Findings. B-118

The mandate has issued in the following cases: *Zhu v. Mukasey*, 537 F.3d 1034, 1038-43 (9th Cir. 2008) (IJ speculated, failed to address explanations, improperly relied on a statement given in airport interview that was not inconsistent with subsequent testimony, failed to provide an opportunity to explain a perceived inconsistency, and relied on minor inconsistencies that did not go to heart of claim); *Tekle v. Mukasey*, 533 F.3d 1044, 1052-55 (9th Cir. 2008) (IJ mischaracterized evidence, characterized evidence out of context, failed to provide applicant opportunity to explain some perceived inconsistencies, and failed to address applicant's explanations of other perceived inconsistencies).

L. Cases Upholding Negative Credibility Findings.. . . . . B-121

The mandate as has issued in the following cases: *Dhital v. Mukasey*, 532 F.3d 1044, 1050-51 (9th Cir. 2008) (filing of fraudulent first asylum application; repetition of fraudulent claim in asylum interview and initial hearing before IJ;

inconsistency between explanation that false identity was used on first application in order to hide from persecutors, while simultaneously using true name to renew Nepalese passport and apply for credit cards); *Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (alien's admission that she voluntarily returned to Indonesia twice following previous trips to the United States "inherently undermines her testimony that she experienced past suffering or that she feared returning home").

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See also *Tekle v. Mukasey*, 533 F.3d 1044, 1053-54 (9th Cir. 2008) (reversing negative credibility finding and explaining that "under ordinary circumstances" an IJ's doubt of the veracity of hearsay should not form the basis for an adverse credibility finding).

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The mandate has issued in *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1209 (9th Cir. 2008) (alien's reluctant acquiescence to her father's requests to use her son's birth certificate was not an "affirmative act" of assistance).

Sanchez v. Mukasey, 521 F.3d 1106, 1106-10 (9th Cir.), *rehearing en banc granted by* 546 F.3d 1051 (9th Cir. 2008) (order). *Sanchez* was argued and submitted to an en banc panel on December 15, 2008. The three-judge opinion reported at 521 F.3d 1106 is not to be cited as precedent.

"Acquiescence is not an affirmative act . . . ." *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1209 (9th Cir. 2008).

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Correction: The first sentence of the second paragraph should read: Whether or not a person has the subjective intent to deceive in order to obtain immigration benefits is a question of fact reviewed for clear error. *United States v. Hovsepian*, 422 F.3d 883, 885, 887 (9th Cir. 2005) (en banc) (citing Fed. R. Civ. P. 52(a)).

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a. Jurisdiction. B-150

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See also *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015-16 (9th Cir. 2008) (per curiam) (where motion to reopen is filed after period for voluntary departure period has elapsed, the BIA is compelled to deny the motion pursuant to 8 U.S.C. § 1229c(d)(1)).

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Sanchez v. Mukasey, 521 F.3d 1106, 1106-10 (9th Cir.), *rehearing en banc granted by* 546 F.3d 1051 (9th Cir. 2008) (order). *Sanchez* was argued and submitted to an en banc panel on December 15, 2008. The three-judge opinion reported at 521 F.3d 1106 is not to be cited as precedent.

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Orozco v. Mukasey, 521 F.3d 1068, 1072 (9th Cir.) (stating that "an alien's entry into the United States must be lawful for the alien to qualify for adjustment of status"), *vacated by* 546 F.3d 1147 (9th Cir. 2008) (order).

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MOTIONS TO REOPEN OR RECONSIDER

IMMIGRATION PROCEEDINGS

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND TO RECONSIDER. C-1

A. Motion to Reopen. C-1

The mandate has issued in *Doissaint v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008) (Whereas "a motion to *reconsider* seeks to correct alleged errors of fact or law," a "motion to *reopen* . . . is purely fact-based, seeking to present newly discovered facts or changed circumstances since a petitioner's hearing.").

Shin v. Mukasey, 519 F.3d 901, 907 (9th Cir.), *withdrawn and superceded by* 547 F.3d 1019, 1025 (9th Cir. 2008) (mandate pending) ("Aliens who seek to remand or reopen proceedings to pursue relief bear a 'heavy burden' of proving that, if proceedings were reopened, the new evidence would likely change the result in the case.").

B. Motion to Reconsider. C-2

C. Motion to Remand.. . . . . C-2

See also *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1063 (9th Cir. 2008) ("The formal requirements of a motion to remand and a motion to reopen are the same.").

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The mandate has issued in *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008) (court lacks jurisdiction to review the BIA's decision not to invoke its *sua sponte* authority to reopen proceedings under 8 C.F.R. § 1003.2(a)).

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Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008), *amended and superseded on denial of rehearing by* *Parussimova v. Mukasey*, No. 06-75217, — F.3d —, 2009 WL 161220 (9th Cir. January 26, 2009) (mandate pending).

Shin v. Mukasey, 519 F.3d 901, 907 (9th Cir.), *withdrawn and superceded by* 547 F.3d 1019, 1025 (9th Cir. 2008) (mandate pending) ("Aliens who seek to remand or reopen proceedings to pursue relief bear a 'heavy burden' of proving that, if proceedings were reopened, the new evidence would likely change the result in the case.").

E. Discretionary Denial. C-13

F. Failure to Depart Voluntarily. C-14

Granados-Oseguera v. Gonzales, 464 F.3d 993 (9th Cir. 2006), *withdrawn and superceded by* 546 F.3d 1011, 1015 (9th Cir. 2008) (per curiam) (holding that because motion to reopen was filed after expiration of voluntary departure period, BIA was compelled to deny the motion).

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The mandate has issued in the following cases: *Dela Cruz v. Mukasey*, 532 F.3d 946, 949 (9th Cir. 2008) (per curiam) (relying on *Stone v. INS*, 514 U.S. 386, 405-06 (1995) for proposition that "a removal order is final when issued" regardless of subsequent motion to reconsider); *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008) (publication of CAT regulations in Federal Register provided adequate notice of June 21, 1999 deadline to file motion to reopen based on CAT claim of applicant subject to pre-March 22, 1999 removal order); *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041-42 (9th Cir. 2008) (where an alien is ordered deported, but is granted deferral under the CAT, the order constitutes an order of deportation, and the ninety-day time period for filing a motion to reopen begins to run when the order becomes final).

2. Numerical Limitations. C-17

See also *Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) (mandate pending) ("[A]liens are entitled to file only one motion to reopen.").

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But see *Cui v. Mukasey*, 538 F.3d 1289, 1293 (9th Cir. 2008) (addressing adequate notice in the context of fingerprint requirements and concluding that notice for fingerprint requirement was insufficient where alien spoke Mandarin and IJ directed fingerprint instructions to counsel).

(v) Notice to Juvenile Insufficient. C-24

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The mandate has issued in *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008) (stating the court lacks jurisdiction to review a claim that the BIA should have exercised its *sua sponte* power to reopen deportation proceedings).

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Granados-Oseguera v. Gonzales, 464 F.3d 993 (9th Cir. 2006), *withdrawn and superceded by* 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (concluding that even if alien's failure to file a timely motion to reopen were the result of IAC, there was no prejudice because of statutory bar to relief where alien overstayed the voluntary departure period).

C. Standard of Review. C-30

D. Requirements for Due Process Violation. C-30

1. Constitutional Basis. C-30

"[D]ue process rights to assistance of counsel do not extend beyond the fairness of the hearing itself." *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008) (mandate pending). The "Fifth Amendment simply does not apply to preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding." *Id.* at 1051. Furthermore, the legal services must be rendered "while proceedings were ongoing." *Id.* at 1050 (concluding there was no ineffective assistance of counsel, where attorney failed to properly file visa application and the deficiency did not relate to the substance of an ongoing proceeding).

2. Counsel's Competence. C-31

The mandate has issued in *Nehad v. Mukasey*, 535 F.3d 962, 971-72 (9th Cir. 2008) (concluding that counsel's performance was deficient where counsel pressured client to accept voluntary departure under threat of counsel's withdrawal two hours before hearing).

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1. Exceptions.. . . . . C-33

Granados-Oseguera v. Gonzales, 464 F.3d 993 (9th Cir. 2006), *withdrawn and superceded by* *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (no longer addressing *Lozada*, and concluding that even if alien's failure to file a timely motion to reopen were the result of IAC, there was no prejudice because of statutory bar to relief where alien overstayed the voluntary departure period).

F. Cases Discussing Ineffective Assistance of Counsel. C-34

1. Cases Finding Ineffective Assistance. C-34

The mandate has issued in *Nehad v. Mukasey*, 535 F.3d 962, 967-72 (9th Cir. 2008) (pressuring alien to accept voluntary departure under threat of counsel's withdrawal two hours before hearing).

Granados-Oseguera v. Gonzales, 464 F.3d 993 (9th Cir. 2006), *withdrawn and superceded by Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (on rehearing the court denied the petition for review concluding that even if there was IAC, there was no prejudice resulting from the ineffective assistance due to statutory bar to relief where petitioner overstayed voluntary departure period).

2. Cases Rejecting Ineffective Assistance of Counsel Claims C-36

Balam-Chuc v. Mukasey, 547 F.3d 1044, 1050-51 (9th Cir. 2008) (mandate pending) (where attorney failed to properly file a visa petition, the Fifth Amendment did not apply because the deficiency did not relate to the substance or

fundamental fairness of an ongoing hearing); *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (on rehearing the court denied the petition for review concluding that even if there was IAC, there was no prejudice resulting from the ineffective assistance due to statutory bar to relief where petitioner overstayed voluntary departure period).

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The mandate has issued in *Toufighi v. Mukasey*, 538 F.3d 988, 996-97 (9th Cir. 2008) (petition denied).

C. Motions to Reopen to Apply for Relief Under the Convention Against Torture.. . . . . C-38

The mandate has issued in *Williams v. Mukasey*, 531 F.3d 1040, 1042-43 (9th Cir. 2008) (publication of CAT regulations in Federal Register provided adequate notice of June 21, 1999 deadline to file motion to reopen based on CAT claim of applicant subject to pre-March 22, 1999 removal order).

D. Motions to Reopen to Apply for Adjustment of Status.. . . . . C-39

The mandate has issued in *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041-42 (9th Cir. 2008) (petition denied as untimely).

Kalilu v. Mukasey, 516 F.3d 777, 779-80 (9th Cir. 2008) (per curiam), *amended and superseded on denial of rehearing by* 548 F.3d 1215, 1217 (9th Cir. 2008) (per curiam) (remanding "for an exercise of the agency's discretion that takes into consideration the factors set forth in [*Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002)]".

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CRIMINAL ISSUES IN IMMIGRATION LAW

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B. The Current Judicial Review Scheme under the REAL ID Act of 2005. . . . . D-2

1. Expanded Jurisdiction on Direct Review. D-2

Afridi v. Gonzales, 442 F.3d 1212, 1218 (9th Cir. 2006) (holding with respect to particularly serious crimes that "[w]hile we cannot reweigh evidence to determine if the crime was indeed particularly serious, we can determine whether the BIA applied the correct legal standard in making its determination"), *overruled on other grounds by* *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008).

See also *Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008) (mandate pending) (considering question of law whether the applicable statutes permit the agency to determine petitioner's offenses to be "particularly serious" by individual adjudication).

2. Applicability to Former Transitional Rules Cases. D-4

3. Contraction of Habeas Jurisdiction.. . . . . D-4

The mandate has issued in *Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (holding that aliens whose petitions for review were rendered untimely by enactment of REAL ID Act had a grace period of 30 days from the Act's effective date in which to seek review).

II. CRIMINAL CONVICTIONS AS GROUNDS FOR INADMISSIBILITY AND REMOVABILITY. D-5

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B. Differing Burdens of Proof. D-6

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1. One-Year Sentences. D-10

2. Recidivist Enhancements. D-10

3. Misdemeanors. D-11

Afridi v. Gonzales, 442 F.3d 1212, 1217 n.2 (9th Cir. 2006) (rejecting the contention that a misdemeanor conviction may not qualify as an aggravated felony), *overruled on other grounds by* *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008).

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B. Categorical Approach D-13

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See also *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc) (holding that district court could rely on state court clerk's minute order in determining whether prior state burglary conviction qualified as a crime of violence).

2. Police Reports and Stipulations. D-17

3. Probation or Presentence Reports. D-18

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a. Single Crime Committed Within Five Years of Admission. D-20

b. Multiple Offenses at Any Time. D-20

2. Inadmissibility pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) D-21

3. Definition of Crime Involving Moral Turpitude. D-21

"When the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *See* *Latu v. Mukasey*, 547 F.3d 1070, 1074 (9th Cir. 2008) (quotation marks and citation omitted) (concluding that violation of Hawaii Revised Statute § 291C-12.5(a), which requires the a driver to give an address or vehicle registration number following an accident resulting in substantial bodily injury, was not a CMT).

See also *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (per curiam) ("Petty theft is a crime involving moral turpitude under 8 U.S.C. § 1229b(b)(1)(B).")

B. Controlled Substances Offenses. D-24

1. Deportation Ground – 8 U.S.C. § 1227(a)(2)(B)(i) D-24

2. Inadmissibility Grounds – 8 U.S.C. § 1182(a)(2)(A)(i)(II) & 8 U.S.C. § 1182(a)(2)(C). D-25

V. CATEGORIES OF CRIMINAL OFFENSES THAT ARE GROUNDS OF REMOVABILITY ONLY.. . . . . D-25

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a. Rape. D-26

b. Sexual Abuse of a Minor. D-27

Afridi v. Gonzales, 442 F.3d 1212, 1215-17 (9th Cir. 2006), *overruled by* *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008).

Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1160 (9th Cir. 2008) (concluding that California convictions under §§ 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) do not categorically constitute "sexual abuse of a minor"), *overruling* *Afridi v. Gonzales*, 442 F.3d 1212, 1215-17 (9th Cir. 2006).

2. Illicit Trafficking in a Controlled Substance – 8 U.S.C. § 1101(a)(43)(B). D-28

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6. Crimes of Violence ("COV") – 8 U.S.C. § 1101(a)(43)(F) D-30

a. Negligent and Reckless Conduct Insufficient.. . . . . D-31

The mandate has issued in *Penuliar v. Mukasey*, 528 F.3d 603, 609-10 (9th Cir. 2008) (evading an officer in violation of California Vehicle Code § 2800.2 does not categorically qualify as a COV).

b. Force Against Another. D-32

c. Specific Crimes Considered. D-32

Ortiz-Magana v. Mukasey, 523 F.3d 1042, 1051 (9th Cir.), *amended and superseded by* 542 F.3d 653, 661 (9th Cir. 2008) (holding that an alien "convicted of aiding an abetting an assault with a deadly weapon under California Penal Code § 245(a)(1) has committed a crime of violence").

7. Theft or Burglary – 8 U.S.C. § 1101(a)(43)(G). D-33

The mandate has issued in *Penuliar v. Mukasey*, 528 F.3d 603, 611-12 (9th Cir. 2008) (unlawful driving or taking of a vehicle under Cal. Vehicle Code

§ 10851(a) does not categorically qualify as a theft offense because it extends liability to accessories after the fact).

8. Ransom Offenses – 8 U.S.C. § 1101(a)(43)(H) D-34

9. Child Pornography Offenses – 8 U.S.C. § 1101(a)(43)(I) D-34

10. RICO Offenses – 8 U.S.C. § 1101(a)(43)(J).. . . . . D-35

11. Prostitution and Slavery Offenses – 8 U.S.C. § 1101(a)(43)(K) D-35

12. National Defense Offenses – 8 U.S.C. § 1101(a)(43)(L) D-36

13. Fraud or Deceit Offenses – 8 U.S.C. § 1101(a)(43)(M) D-36

The Supreme Court granted certiorari in *Nijhawan v. Mukasey*, No. 08-795, — S. Ct. —, 2009 WL 104300, *1 (January 16, 2009), to address the following question: "Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,' 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million."

14. Alien Smuggling – 8 U.S.C. § 1101(a)(43)(N).. . . . . D-37

15. Illegal Reentry after Deportation for Aggravated Felony – 8 U.S.C. § 1101(a)(43)(O). D-38

16. Passport Forgery – 8 U.S.C. § 1101(a)(43)(P). D-38

17. Failure to Appear for Service of Sentence – 8 U.S.C. § 1101(a)(43)(Q). D-39

18. Commercial Bribery and Counterfeiting – 8 U.S.C. § 1101(a)(43)(R). D-39

19. Obstruction of Justice – 8 U.S.C. § 1101(a)(43)(S). D-39

Renteria-Morales v. Mukasey, 532 F.3d 949 (9th Cir. 2008), *withdrawn and superseded by* *Renteria-Morales v. Mukasey*, Nos. 04-74742, 06-73283, — F.3d —, 2008 WL 5192056, *9-*10 (9th Cir. December 12, 2008) (mandate pending) (conviction under 18 U.S.C. § 3146 qualifies as generic crime of "obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S)).

20. Failure to Appear before a Court –
8 U.S.C. § 1101(a)(43)(T). D-40

Renteria-Morales v. Mukasey, 532 F.3d 949 (9th Cir. 2008), *withdrawn and superseded by* *Renteria-Morales v. Mukasey*, Nos. 04-74742, 06-73283, — F.3d —, 2008 WL 5192056, *9-*10 (9th Cir. December 12, 2008) (mandate pending) (conviction under 18 U.S.C. § 3146 for failing to appear in court, or "bail jumping," was not categorically an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(T)).

21. Attempt or Conspiracy to Commit an Aggravated Felony-
8 U.S.C. § 1101(a)(43)(U). D-40

The Supreme Court granted certiorari in *Nijhawan v. Mukasey*, No. 08-795, — S. Ct. —, 2009 WL 104300, *1 (January 16, 2009), to address the following question: "Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,' 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million."

B. Domestic Violence and Child Abuse Offenses
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1. General Definition. D-40

2. Cases Considering Domestic Violence Convictions
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Alanis-Alvarado v. Mukasey, 541 F.3d 966, 968-71 (9th Cir. 2008) (mandate pending) (California conviction under Cal. Fam. Code § 6320 categorically

qualified as conviction of violating a "protection order" under 8 U.S.C. § 1227(a)(2)(E)(ii)).

3. Cases Considering Child Abuse Convictions. D-42

C. Firearms Offenses. D-42

D. Miscellaneous Removable Offenses. D-43

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DUE PROCESS IN IMMIGRATION PROCEEDINGS

I. DUE PROCESS.. . . . . E-1

A. Generally. E-1

Shin v. Mukasey, 519 F.3d 901, 906 (9th Cir.), *withdrawn and superceded by* 547 F.3d 1019, 1024 (9th Cir. 2008) (mandate pending) (explaining that to successfully attack the conclusions and orders made during removal hearings on due process grounds "it must be shown that the proceedings were manifestly unfair and that the actions of the [immigration judge] were such as to prevent a fair investigation") (internal quotation marks and citation omitted)).

B. Prejudice Requirement. E-2

Cf. *Lazaro v. Mukasey*, 527 F.3d 977, 981 (9th Cir. 2008) (explaining that prejudice is not necessary where agency action was *ultra vires*).

1. Presumption of Prejudice. E-4

C. Exhaustion Requirement. E-4

Granados-Oseguera v. Gonzales, 464 F.3d 993 (9th Cir. 2006), *withdrawn and superceded by* *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (on rehearing the court denied the petition for review concluding that even if there was IAC, there was no prejudice resulting from the alleged ineffective assistance due to statutory bar to relief where petitioner overstayed voluntary departure period).

See also *de Mercado v. Mukasey*, 539 F.3d 1102, 1106 n.4 (9th Cir. 2008) (mandate pending) (claim that IJ failed to serve as an impartial adjudicator and denied petitioner a full and fair hearing was unreviewable where the claim was not asserted in brief to BIA).

D. Discretionary Decisions. E-6

E. Examples. E-7

1. Notice to Appear. E-7

The failure of the notice to appear to designate which subsection of statute defining aggravated felony is applicable to alien does not deprive the immigration court of jurisdiction. *See* *Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008).

2. Notice of Hearing. E-7

3. Hearing Date. E-8

4. Right to a Neutral Fact-Finder. E-8

5. Pressure to Withdraw Application. E-10

6. Apparent Eligibility for Relief. E-10

7. Explanation of Procedures. E-10

8. Exclusion of Evidence or Testimony. E-11

The mandate has issued in *Morgan v. Mukasey*, 529 F.3d 1202 (9th Cir. 2008) (IJ violated due process by refusing to allow applicants' two children to testify on the basis that they did not appear on the pretrial witness list because the testimony could have corroborated the mother's testimony regarding persecution in Egypt after her credibility had been put in doubt).

9. Exclusionary Rule and Admission of Evidence. E-12

Although the exclusionary rule generally does not apply in immigration proceedings, "administrative tribunals are still required to exclude evidence that was obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution." *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008) (mandate pending). Thus, where egregious violations of the Fourth Amendment occur, the exclusionary rule may apply. *See id.* (concluding IJ erred by denying motion to suppress where statements were obtained immediately following the unconstitutional entry of alien's home). "A Fourth Amendment violation is egregious if evidence is obtained by deliberate violations of the Fourth Amendment or by conduct a *reasonable officer* should have known is in violation of the Constitution." *Id.* at 1018 (internal quotation marks and citation omitted).

See also Rodriguez-Echeverria v. Mukasey, 534 F.3d 1047 (9th Cir. 2008) (declining to reach issue of whether IJ erred by admitting I-213 or by refusing to allow alien to testify, but concluding that alien was under arrest at the time she was interrogated, and thus was entitled to advisement of her right to counsel and right to remain silent pursuant to Department of Homeland Security regulations, and remanding).

10. Right to Confront and Cross-Examine Witnesses.. . . . . E-12

Shin v. Mukasey, 519 F.3d 901, 906 (9th Cir.), *withdrawn and superceded by* 547 F.3d 1019, 1024-25 (9th Cir. 2008) (mandate pending) (admission of deposition testimony from former federal immigration official did not violate due process where official was cross-examined by alien's counsel during the deposition, and official was made available during alien's hearing if additional testimony was needed).

11. Production of Documents. E-13

12. New Country of Deportation. E-14

13. Right to Translation. E-14

14. Administrative Notice of Facts. E-14

15. Right to Counsel. E-15

The mandate has issued in *Ram v. Mukasey*, 529 F.3d 1238, 1241 (9th Cir. 2008) ("Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." (quotation marks and citation omitted)).

16. Ineffective Assistance of Counsel.. . . . . E-16

"[D]ue process rights to assistance of counsel do not extend beyond the fairness of the hearing itself." *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008) (mandate pending). The "Fifth Amendment simply does not apply to preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding." *Id.* at 1051. Furthermore, the legal services must be rendered "while proceedings were ongoing." *Id.* at 1050 (concluding there was no ineffective assistance of counsel, where attorney failed to properly file visa application and the deficiency did not relate to the substance of an ongoing proceeding).

Impinging on a petitioner's "authority to decide whether, and on what terms, to concede his case" by failing to insure counsel's withdrawal will not prejudice the petitioner can "effectively deprive[] [the petitioner] of the ability to present his case . . . ." *See Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (concluding that counsel's performance was deficient where counsel pressured client to accept

voluntary departure under threat of counsel's withdrawal two hours before hearing).

The mandate has issued in *Hernandez v. Mukasey*, 524 F.3d 1014, 1017 (9th Cir. 2008) ("[I]f an individual chooses to retain counsel, his or her due process right includes a right to *competent representation*." (internal quotation marks omitted) (emphasis in original)).

17. Waiver of Appeal. E-17

18. Right to File Brief. E-18

19. Consideration of Evidence by Agency. E-18

20. Notice of Evidentiary Requirements.. . . . . E-19

21. Intervening Law. E-19

See also *Williams v. Mukasey*, 531 F.3d 1040, 1043 (9th Cir. 2008) (concluding that publication in the Federal Register of regulations implemented while alien was incarcerated provided alien with notice required by due process).

22. Sua Sponte Credibility Determinations.. . . . . E-19

23. Detention *(new section)*

The Attorney General's statutory authority to detain aliens whose administrative review is complete but whose removal is stayed pending the court of appeals' resolution of a petition for review is grounded in 8 U.S.C. § 1226(a). *See* *Prieto-Romero v. Clark*, 534 F.3d 1053, 1068 (9th Cir. 2008) (mandate pending). 8 U.S.C. § 1226(a) does not authorize indefinite detention. However, where an alien's detention is prolonged by pursuit of judicial review of his administratively final removal order, the detention continues to be authorized by § 1226(a). *See* *Prieto-Romero*, 534 F.3d at 1068. Due process requires "adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding judicial restraint." *Id.* at 1065.

F. Due Process Challenges to Certain Procedures and Statutory Provisions E-20

1. Summary Affirmance. E-20

2. Reinstated Removal Proceedings. E-21

3. IIRIRA. E-21

II. MISCELLANEOUS CONSTITUTIONAL ISSUES. E-22

A. Equal Protection Generally. E-22

Granados-Oseguera v. Gonzales, 464 F.3d 993, 996 (9th Cir. 2006), *withdrawn and superceded by* *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (on rehearing the court denied the petition for review and did not discuss equal protection).

1. NACARA. E-22

2. Voluntary Departure. E-23

Granados-Oseguera v. Gonzales, 464 F.3d 993, 997 (9th Cir. 2006), *withdrawn and superceded by* *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (on rehearing the court denied the petition for review and did not discuss equal protection).

3. 8 C.F.R. § 1003.44. . . . . E-23

4. 8 U.S.C. § 1182(h) Waiver. E-24

5. Availability of Discretionary Relief E-24

Komarenko v. INS, 35 F.3d 432, 434 (9th Cir. 1994), *abrogated by* *Abebe v. Mukasey*, No. 05-76201, — F.3d —, 2009 WL 50120, *3 (9th Cir. January 5, 2009) (en banc) (per curiam) (mandate pending); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981), *overruled by Abebe*, 2009 WL 50120 at *3.

This court overruled *Tapia-Acuna*'s holding "that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation[,]" and held that the "BIA did not violate petitioner's right to equal protection by finding him ineligible for section 212(c) relief from deportation." *Abebe v. Mukasey*, No. 05-76201, — F.3d —, 2009 WL 50120, *3 (9th Cir. January 5, 2009) (en banc) (per curiam) (mandate pending).

B. Suspension Clause. E-24

"The Suspension Clause provides that '[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'" *Singh v. Mukasey*, 533 F.3d 1103, 1106 (9th Cir. 2008) (quoting U.S. Const. art. 1, § 9, cl. 2.). "Congress may eliminate the writ

without running afoul of the Suspension Clause so long as it provides a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Singh*, 533 F.3d at 1106 (internal quotation marks and citation omitted).

See also *Garcia de Rincon v. Mukasey*, 539 F.3d 1133, 1141 (9th Cir. 2008) (jurisdictional limitations on review of alien's expedited removal order did not violate the suspension clause).

C. Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act.. . . . . E-25

ATTORNEY FEES AND RECOVERABLE EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT ("EAJA")

I. THE STATUTE.. . . . . F-1

II. CASELAW. F-2

A. Filing Deadline. F-2

B. Prevailing Party. F-3

C. Position of the United States. F-4

D. Substantial Justification.. . . . . F-4

E. Enhanced Fees.. . . . . F-6

III. COURT PROCEDURES.. . . . . F-6

Form AO 291, Application for Fees and Other Expenses Under the Equal Access to Justice Act, is available on the Ninth Circuit website:

- http://www.ca9.uscourts.gov/datastore/uploads/forms/EAJA-Fees.pdf

The court annually posts a notice regarding the statutory maximum rates under EAJA. The most recent notice is available at:

- http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039

The Notice currently states:

> Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (d)(2)(A), *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005), and Ninth Circuit Rule 39-1.6, the applicable statutory maximum hourly rates under EAJA, adjusted for increases in the cost of living, are as follows:
>
> For work performed in:
>
> 2008: $172.85
>
> 2007: $166.46
>
> 2006: $161.85
>
> 2005: $156.79

2003: $147.72

2004: $151.65

2002: $144.43

2001: $142.18